Puerto Rican Family Institute, Inc. *and* Local 144, Hotel, Hospital, Nursing Home & Allied Services, SEIU, AFL–CIO *and* Lucy Diaz. Cases 2–CA–25084, 2–CA–25126, and 2–CA–25579

May 28, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT AND RAUDABAUGH

On November 9, 1992, Administrative Law Judge Eleanor MacDonald issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed a brief in support of the administrative law judge.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Puerto Rican Family Institute, Inc., New York, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. No exceptions were filed with respect to the judge's 8(a)(1) findings.

[2] Member Raudabaugh finds it unnecessary to rely on evidence of disparate treatment to find that the discharges of probationary employees Lillian Lafont, Avery Smith, and Mervis Lewis were unlawful. In this regard, he notes that the employees to whom these three were compared were not probationary employees. However, Member Raudabaugh agrees that other evidence relied on by the judge establishes the violations as to these three employees.

Margit Reiner, Esq., for the General Counsel.
Harris L. Present, Esq., of New York, New York, for the Respondent.
Ivan D. Smith, Esq. (Vladeck, Waldman, Elias & Engelhard), of New York, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ELEANOR MACDONALD, Administrative Law Judge. This case was tried in New York, New York, on 7 days between February 18 and March 27, 1992. The complaint alleges that Respondent, in violation of Section 8(a)(1) and (3) of the Act, interrogated its employees, instructed its employees to report union activities and not to engage in union activities, discharged its employees Avery Smith, Lillian Lafont, and Mervis Lewis, and gave an unsatisfactory evaluation to its employee Lucy Diaz and placed Diaz on probation. Respondent denies the material allegations of the complaint.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent in May 1992, I make the following[1]

FINDINGS OF FACT

I. JURISDICTION

Respondent a New York corporation, with its principal office in New York, New York, is engaged in the provision of social care services. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

In January 1991, the Union commenced an organizational campaign and on March 27, 1991, the Union filed a representation petition with the Board in Case 2–RC–21016 requesting certification to represent certain of Respondent's employees including nonprofessionals employed at intermediate care facilities. An intermediate care facility (ICF) is a residence that cares for profoundly developmentally disabled individuals. The Respondent operates three ICF residences. The election was conducted on May 1, 1991; the Union did not receive a majority of the votes cast. On October 15, 1991, the Board issued a decision setting aside the election based on the Union's objection and a Direction of Second Election.

The executive director of Respondent is Maria Elena Girone. Her assistant executive director is Elvira Gonzalez. In November 1990, Lynne Medley was hired as program director with responsibility for the day-to-day operation of the three ICFs.[2] Medley was particularly charged with improving the operation of ICF 1 at Laconia Avenue in the Bronx, which had been placed under sanctions by the New York State regulatory authorities and was threatened with removal of its operating license and subsequent closure if conditions did not improve. Medley reports to both Girone and Gonzalez: she supervises the residence managers and assistant residence managers at each ICF as well as the direct care workers and professional clinical consultants employed at the facilities.[3] The power to hire and fire employees rests with Girone or with Gonzalez acting as her delegee. Medley recommends termination and discipline to Girone in appropriate cases.

[1] Certain errors in the transcript were noted and corrected.

[2] Medley has a nursing home administrator's license; the regulations for nursing homes and intermediate care facilities are identical.

[3] Direct care workers help clients with all the activities of daily living.

Medley testified that she became aware of union activity among Respondent's employees in late February or early March 1991. Medley, who has an office at all three ICF locations, noticed that there was ''strange activity,'' that people stopped talking when she appeared and that employees were wearing union insignia. Medley informed Gonzalez of her observations. Medley admitted that she questioned a number of employees about union activity, as will be described below.

According to Gonzalez, when Medley had alerted her that there was union activity going on at the facility, Medley mentioned disappearing files, people calling in sick and ''disruptive behavior.'' Gonzalez noted that only the employees at ICF 1 supported the Union by wearing union hats and buttons. Gonzalez made preelection speeches at the ICF facilities where she informed the employees of some disadvantages of voting for the Union. According to Gonzalez, Respondent did not want the Union to win the election. Gonzalez was aware that employees Lillian Lafont and Avery Smith, both of whom had just been discharged, were active in behalf of the Union, but she denied that employees asked questions about the discharges of Lafont and Smith at the preelection meetings. Based on the testimony of employee Lucy Diaz, whom I find to be an especially convincing witness, I find that at the preelection meeting, Gonzalez told the assembled employees that if they thought the Union would be able to achieve the reinstatement of Smith and Lafont they were wrong: union or no union, these two would not be reinstated.

The various letters detailing the deficiencies cited by the State in the imposition of sanctions upon ICF 1 relate to shortcomings in such areas as providing in service training to staff, developing treatment plans for individual clients, providing adequate clothing and supplies for clients, properly assessing clients' needs, providing adequate stocks of food for the facility, providing adequate heat and providing repair and maintenance of the facility. Most of the deficiencies are due to a failure of management and of the professional consulting staff to perform a task which is their obligation; only a very small percentage of the deficiencies related to failures of direct care workers to perform their duties. Even so, when Girone wrote to the New York State regulatory agency on August 7, 1991, enclosing a ''Corrective Action Plan'' to address the deficiencies found by the State at ICF 1, she stated:

> [W]e have displayed tremendous efforts in bringing this facility into compliance after a most difficult year of staff changes and disruptions caused by Union activities. This site in particular has been severely affected.

Medley testified that Respondent employs a disciplinary system that is oriented to ''problem solving.'' Respondent tries as much as possible to ''work with'' employees, using progressive discipline, and stringent actions are used as a last resort. According to Medley, no employee should be surprised by a negative evaluation.

Respondent maintains employee personnel files. As various witnesses were called to testify in the instant hearing, it became evident that employees were not given copies of all the documents placed in their personnel files. Indeed, it is not clear what documents were actually in the files: although counsel for the General Counsel subpoenaed certain personnel files, I became convinced as the evidence developed, that Respondent did not provide all the material in the files in response to the subpoena. Further, it was obvious that some material was supplied to General Counsel that had not actually been in the files. This material had been placed in the personnel files to make them seem complete after the subpoena had been served. Medley testified that the personnel files contained notes that she and other supervisors made concerning individual employees. Although Medley stated that employees have the opportunity to see what is written about them, her further testimony shows that employees are not told that they may examine notes of conferences or disciplinary meetings. Indeed, employees may not be aware that such notes exist. From Medley's testimony, I reached the conclusion that Medley and other supervisors often write notes about oral warnings or conferences with employees and place these in the employees' files without any notice at all to the affected employees. Respondent does not have a standard practice that employees must sign any document relating to discipline that is placed in their files.

Further, certain records concerning purported medication errors was shown to witnesses. It then became apparent that the records were not the original records that had been initialled and filled in by the employees when the medication was administered but that the documents produced at the hearing had been written later. It was further revealed that the original documents had been rewritten at management's direction to conform more closely to the requirements for giving medication and keeping records. I formed the belief after listening to the testimony of various witnesses that record keeping is a very important part of Respondent's compliance with state regulations and that documents are often prepared or rewritten so that they may be placed in the files against the day when a state inspector will ask to see them. It is clear to me that Respondent has a practice of making its files look good; but I am convinced that material placed in the files is often not accurate and that it may have been written long after the relevant events occurred.

In summary, I find that I cannot fully rely on and accept at face value any files produced by Respondent because the complete file may not have been produced, because material may have been added to the file for various purposes and because many of the papers in the file do not accurately reflect when they were prepared or the events they purport to describe.

B. *Alleged Violations of Section 8(a)(1) of the Act*

Medley admitted that she asked Avery Smith, Toni Vaughn and other employees about union activity.

Vaughn worked as a cook at ICF 1 until she resigned for reasons of health. Respondent has repeatedly assured Vaughn that she can return to her old position at any time. Vaughn did not engage in any overt organizational activities at the facility, and Respondent did not know that she had joined the Union shortly before the election. Vaughn testified that she first became aware of the Union in March 1991, when Medley called Vaughn and employee Debra London into her office. Medley said that she wanted some information about union activities; she asked for the truth and she stated that if anything was going on she would like to know about it. Medley instructed the two employees that she did not want

any union activity to take place on the premises because it would be detrimental to the clients. Both Vaughn and London indicated that they had not heard about the Union at this point. Then, Medley called in employee Avery Smith. In the presence of Vaughn and London, Medley told Smith she did not want any union activity taking place at the facility because it would not help the clients and would be a problem for them. Medley also asked Smith if she knew anything about the Union.

Smith testified essentially to the same effect. According to Smith, Medley asked her if she knew of any union activities and whether she was involved in such activities. When Smith proclaimed herself a union supporter, Medley replied that she did not care if Smith was for or against the Union, but that she did not want union activities taking place in the facility where employees were neglecting clients. Smith denied that employees were neglecting clients and she told Medley that clients were being cared for.

Although Medley admitted asking employees about their union activities, when questioned by counsel for Respondent whether she had ''interrogated'' employees, Medley denied the allegation. Further, Medley denied instructing employees to report concerning coworkers' union activities. Medley testified that she ''gave instructions for [employees] not to engage in union activity during the regular course of their working hours.'' Counsel for Respondent then posed a leading question, asking Medley whether she said not to do it so as to interfere with the clients, and Medley agreed that this is what she had said. Since Medley did not give the phrase of her own recollection but responded to a leading question, I find that the versions testified to by Vaughn and Smith are more reliable and I shall rely on their testimony.

Based on my discussion above, I find that Medley, the highest ranking managerial person with whom the direct care workers regularly came into contact and the manager with day-to-day authority over the operations of the facility, called London and Vaughn into her office and asked them whether anything was going on with union activities. Medley said if anything was going on she wanted the truth about it. She also instructed them that they were not to engage in union activities on the premises because such activity would be detrimental to the clients. Medley did not assure London and Vaughn that they had any right to support the Union without fear of reprisal nor did she tell them that they were free to engage in union activities on their own time. Her instruction was definite that such activities would be detrimental to the clients. In response to Medley's questions, both Vaughn and London disclaimed any knowledge of the Union. Medley then called Smith to the meeting and repeated her question whether Smith was involved with the Union. After Smith expressed her support of the Union, Medley said she did not care but that union activity could not take place in the facility where employees were neglecting the clients. Medley's statement that ''she did not care'' is meaningless in context: if she really did not care she would not have sought the information. Further, Medley's instruction to Smith presupposed that if the employees were discussing the Union they were necessarily neglecting the clients. Certainly, Smith understood Medley to be making this point because Smith felt compelled to deny that clients were neglected. By the totality of her comments, Medley was thus conveying to the employees that no union activity on Respondent's premises was to be permitted.

I find that Medley's questions reasonably tended to coerce, restrain and interfere with the employees' Section 7 rights: Medley was a high official of Respondent, she called a small group of employees into her private office, she asked not only whether union activity was taking place but also to be informed of any that did take place and she told the employees not to engage in such activity on Respondent's premises. Finally, it is clear from Medley's manner of questioning the employees that she did not know any of the three to be open adherents of the Union. I find that by asking the employees about their own union activities and by asking them to report on any union activity that did take place, Respondent violated Section 8(a)(1) of the Act. *Rossmore House*, 269 NLRB 1176, 1178 (1984), affd. 760 F.2d 1006 (9th Cir. 1985); *Bourne v. NLRB*, 332 F.2d 47 (2d Cir. 1964). Further, Medley's blanket instruction that no union activity could take place at Respondent's facility was unlawful. It is clear that Respondent's employees have breaktime during their shifts and it is also clear that there are times when employees have no clients for whom they are responsible because the clients are attending programs outside the facility or sleeping. Medley did not differentiate between off-duty time and working time when she told the employees not to engage in union activity at the facility. I find that Respondent violated Section 8(a)(1) of the Act when it instructed employees not to engage in union activity at the Respondent's facility. *Our Way*, 268 NLRB 394 (1983).

C. *Discharge of Lillian Lafont*

Lillian Lafont was hired as a direct care worker at ICF 1 in January 1991. During her preemployment interview with Medley, Lafont informed Medley that because she was a single parent she could only work the 11 p.m. to 8 a.m. shift; at other times she had to be available to supervise her own children. The interview form on which Medley wrote when she met with Lafont duly noted that Lafont was available only from 11 p.m. to 8 a.m.

After Lafont heard other employees of Respondent discussing the Union, she signed an authorization card on February 11, 1991. Lafont, attended union meetings, spoke to her coworkers about the Union and distributed blank authorization cards. At the end of February, Medley came to ICF 1 and spoke to the employees in the dining room. Medley said she had heard that there was union activity; she said this was not a problem as long as the activity did not interfere with employees' duties to the clients and that it did not take place in the facility. In April 1991, Lafont attended a preelection conference at the Regional Office; Gonzalez, who was there on behalf of Respondent, said hello to Lafont and the other employees. After this occasion, Lafont started wearing a union hat and buttons and placed a union bumper sticker on her car. She also gave out union literature from time to time.

Lafont was ill and did not work on April 15 and 16, 1991. The next 2 days were her regularly scheduled days off. On April 19, a Friday, Lafont called Residence Manager Pearl Hampton and said she would come to work that night and that she would bring a doctor's note. Hampton told Lafont that her shift had been changed and that Lafont would have to work from 2 to 11 p.m. on Monday and Tuesday. When

Lafont asked why this had happened, Hampton said she did not know and that the request had come from Doris Quinones, the residence manager of ICF 2 who was assisting at ICF 1 in connection with the training of a new assistant residence manager, Awilda Wright. According to Hampton, Medley had approved the shift change. Lafont asked to speak to Medley or Quinones and Hampton replied that she would call Quinones and call Lafont back.[4] That night when Lafont reported to work, she saw that the posted schedule would have required her to work days on Monday, Tuesday, and Saturday; she had only two night shifts left. Lafont immediately called Hampton at home and learned that Hampton had spoken to neither Medley nor Quinones. The next day, Lafont again spoke to Hampton who had not yet reached Medley nor Quinones. Lafont said that Hampton was not friendly on this occasion and that she herself was insistent because she needed an answer to her concerns about the shift change. On Sunday, Lafont again called Hampton, but the latter had no answer for Lafont. At the end of Lafont's shift about 7:30 a.m. on Monday, Hampton called Lafont at the residence. Hampton told Lafont to post a notice that there would be a meeting at 10 a.m. that day and she informed Lafont that she could meet with Medley right after the meeting. Medley did not appear for the 10 a.m. meeting. Lafont offered to call Medley herself, but Hampton told her not to call since she could speak to Medley right after the staff meeting. Lafont, who had been on duty since 11 p.m. the night before, waited at the residence until 11 a.m. and then went home. She was scheduled to be back on duty at 2 p.m. that day. She called Medley about 12:30 p.m. and reminded Medley that she had to be home with her children. She told Medley that she had not been able to find a babysitter for that afternoon. Medley told her to keep trying to find a sitter and to call back before 1:30. Before that time, Lafont called Medley again to say she could not find anyone to mind her children and that she could not work that shift. Medley replied that she had a business to run and that Lafont had to make a choice. Lafont did not work Monday, but she found a babysitter after that and she notified Respondent that she would report to work on Tuesday, April 23. When Lafont went to work on Tuesday, Quinones told her that she was to meet with Medley on April 26, but she refused to tell Lafont what subject matter was to be discussed.

On April 26, Lafont met with Medley and Hampton. Medley told Lafont that she was disappointed in her. Lafont said that she had been flexible and that she had found a babysitter so that she could work the new schedule. Lafont asked why her schedule had been changed. Medley replied that because of staff vacations and training, an employee who was certified to administer medication to the clients was needed from 2 to 11 p.m. and that Lafont was the only one available. Lafont replied that if she had known the reason for the change she would not have been so insistent. Medley said that Lafont had been rude and insubordinate: Lafont responded that she had been insistent but not insubordinate and that she just wanted an answer to her question why her shift had been changed. Medley concluded by saying that she could not stand insubordination and that she was discharging Lafont. Lafont asked Medley to reconsider but Medley said her decision was final.

Lafont received a letter dated April 27, 1991, from Girone which stated:

> Your refusal to accept the change in schedule and your response that the facility would be short staffed every day that you remained on the schedule because you would not come to work and instead would take any day of sick leave, holiday or vacation due to you, would place our clients at risk and the operation of the residence in jeopardy. This threatened action constitutes a charge of gross misconduct.

Lafont testified that, contrary to the assertion in the quoted paragraph, she had never threatened that she would take days off and leave the facility short staffed rather than work the new schedule. At the meeting with Medley, Lafont said she had made arrangements for a babysitter and that she could work the scheduled shifts.

Pearl Hampton, who was the residence manager of ICF 1 from December 1990, until June 1991, when she was demoted to assistant residence manager of ICF 3, did not testify about any of her conversations with Lafont.

Medley testified that she recommended to Girone that Lafont be discharged. Medley had instructed Hampton to find an employee who was certified to give medication and to schedule that employee for the 2 to 11 p.m. shift. According to Medley, Lafont was the only employee available aside from Lucy Diaz who had 12 years' seniority and would likely have resigned had she been assigned to the 2 p.m. shift. Medley stated that Lafont missed 1 day of work before she was able to find a babysitter, but that thereafter she was ''quite accommodating in reference to the schedule change.'' Medley stated that Lafont never told her that she would not work the new shift hours.

Lafont's personnel file contains certain documents upon which Respondent apparently relies to sustain the discharge in the face of the unfair labor practice charge. There are four notes; Respondent claims that one was written by Hampton and three by Medley. Hampton was not questioned at all by counsel for Respondent concerning the incident with Lafont. Counsel merely showed Hampton the note she allegedly wrote. Hampton then stated that she had written that note as well as one on the same page which was admittedly written by Medley. Then counsel asked Hampton if the facts were true and she replied, ''yes.'' Although Hampton testified that she wrote one of the notes, I have carefully compared the handwriting in the portion claimed by Hampton with the many exemplars of Medley's handwriting in evidence. I have come to the conclusion that it is probable that Medley wrote all of the notes and that Hampton did not write any of the notes in Lafont's file. Even if Hampton did write one of the notes she claimed as hers, her willingness to testify that she wrote another note which was actually written by Medley shows that Hampton has trouble recognizing her own handwriting, that she did not carefully consider the questions posed to her and that she answered carelessly. I find that Hampton is not a reliable witness and that she apparently has no recollection of any of the relevant events herein.

The first note in Lafont's file, dated April 19, states that Lafont said she would not work the new schedule and would

[4] Apparently, neither Medley nor Quinones was available to speak to Lafont.

complain to the Labor Board about Respondent's unfair labor practices. In addition, the note states that Lafont would take every day of holiday, vacation and sick leave and leave the agency short staffed. The note does not identify to whom Lafont was speaking during this exchange. As stated above, Respondent claims that Hampton wrote this note. If the note was written by Medley, as I believe, it is patent hearsay and it should be disregarded on that ground. If Hampton did indeed write the note, her failure to testify about the incident that led to Lafont's discharge and her careless testimony about the authorship of the various notes in Lafont's file lead me to conclude that Respondent was not willing to have Hampton's credibility tested on this point because she was not reliable; on that ground, I would also disregard the note dated April 19, 1991. Furthermore, Lafont denied ever making any threat and no witness testified that Lafont did indeed make the statement.

On April 22, Medley wrote a note to the file stating that she had spoken to Lafont and told her the schedule had been changed so that Lafont could administer medication and because ''she is also very useful and helpful therefore she would be most beneficial on this shift.'' The third note to the file states that Lafont called on April 22 to say she could not work that day but that Lafont had worked the next day. The note concludes, ''Recommend termination for insubordination.'' The fourth note was written by Medley after the interview at which Lafont was discharged. This note is interesting only because it contradicts Medley's sworn testimony: Medley testified that Lafont was accommodating and agreed to work the new shift hours, but Medley's note to the file says that Lafont was adamant about not accepting the change in schedule. Further, the note to the file mentions matters which Lafont denied were discussed with Medley and which were not cited in Girone's letter of discharge.[5] This discrepancy among many others leads me to conclude that Medley's notes to the files are not accurate and should not be relied on.

Girone testified that Lafont was discharged for the reason set forth in her discharge letter, namely, Lafont's alleged refusal to work the new schedule and her threat to take days off instead. It is evident that there is no competent testimony that Lafont refused to work the changed hours or threatened to take days off. Lafont testified that she never made either of these statements. Medley did not testify that Lafont made these statements in her presence. Indeed, Medley testified that Lafont was quite accommodating in accepting the schedule change and arranging for a babysitter once it had been explained that Lafont was the only employee certified to dispense medication who could work from 2 to 11 p.m. Finally, Hampton to whom these statements were allegedly made, did not testify that Lafont made any of the threats attributed to her.

Respondent's antiunion animus is established by the record. Gonzalez testified that Respondent opposed the Union. Girone, Gonzalez and Medley all associated the Union with ''disruptive behavior.'' In its correspondence with the state regulatory agency, Respondent blamed its difficulties on the Union even though most of the citations dealt with management and professional failures. As I have found above, Respondent violated Section 8(a)(1) by interrogating its employees and instructing them not to engage in union activity. Respondent was well aware that Lafont was an active supporter of the Union in view of her attendance at the preelection conference and the fact that she wore union insignia at work. I conclude that Respondent discharged Lafont just 5 days before the election because she supported the Union, and I find that Lafont's alleged but unproven refusal to work and threat to take days off was a pretext invented by Respondent to mask its illegal motive.[6] Thus, I find that Respondent violated Section 8(a)(3) and (1) of the Act by discharging Lafont.

D. *Discharge of Avery Smith*

Avery Smith was hired in December 1990, as a direct care worker at ICF 1. In January 1991 employee Lucy Diaz told Smith about the Union and gave Smith an authorization card. Smith signed the card in February; she also attended union meetings in February and March, and she distributed union literature, caps, and buttons. As described above, when Medley questioned her about her union activity, Smith acknowledged that she belonged to the Union.

On Sunday, April 21, 1991, Smith was on duty when she observed that one client was being annoyed by two others. Smith sent one of the aggressors out of the area and tried to calm the situation. One of the remaining clients hit and punched Smith with his closed fist causing scratches, bruises to her temple and eye and a sore neck. Smith called out for help and employees Mervis Lewis and Myrna Sang came to her assistance. After the three had succeeded in calming the violent client, Smith called Medley, told her what had happened and asked to be relieved for the rest of the shift. Then Smith called Residence Manager Pearl Hampton and Assistant Residence Manager Awilda Wright in an effort to secure coverage so that she could go home. In the event, no coverage was provided and Smith worked until the end of her shift. The next day, Smith woke in more pain than she had experienced the prior day and she went to the doctor. After Smith was treated and given medication, she was provided with a doctor's note for her employer. When Smith returned home from seeing her doctor, she called the residence. Wright answered the phone and Smith told her she would not be in to work and then asked to speak to Quinones who was training the newly hired Wright. Wright replied that Quinones was busy and she asked Smith to tell her the problem. However, since Smith wanted to ask Quinones about the procedure for taking more time off and about a possible claim for Workers Compensation, she told Wright that she would call back to speak with Quinones. Smith testified that although she had spoken nicely to Wright, the latter slammed the phone down. Smith then redialed the residence, told Wright she wanted to speak to Quinones and asked Wright why she had slammed the phone down, but Wright hung up on her again. Smith phoned a third time and told Wright that it was an emergency and that she wanted to ask about Workers Compensation. This time Wright went to fetch

[5] Because Girone is the only manager with authority to fire employees, the discharges at issue herein must stand or fall based on the reasons Girone, or her deputy, Gonzalez, cited in the letters of termination. In view of Girone's testimony that the three employees were fired for the reasons given in those letters, I will not consider any other reasons which may have been advanced at the hearing.

[6] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

Quinones.[7] By now Smith was upset and crying; when Quinones came on the line, Smith told her that management did not care about the staff and she yelled at Quinones, but she did not curse at her. Smith testified that she was upset because she was in pain and no one from management, not even Medley, had expressed any concern. No one seemed to care how she was faring. Quinones hung up on Smith, and Smith called her right back. Quinones told Smith that if she stopped yelling, they could talk. Smith replied that she was calm and she asked about Workers Compensation. Quinones said that she did not know anything about that and she advised Smith to call Medley. Smith obtained Hampton's number from Quinones and she called her, but Hampton did not know anything about Workers Compensation. Smith denied that she cursed or yelled at Hampton. Next, Smith called Medley and told her what happened when she had called the facility for information. Smith informed Medley of what she had been told by her doctor and Medley instructed her to fill out Workers Compensation papers. Smith testified that she did not curse or yell at Medley. At the end of the conversation, Medley asked Smith to meet with her.

On April 26, 1991, Smith met with Medley and Hampton in Medley's office. Medley told Smith that she was terminated based on the telephone conversations the day after Smith was injured and based on write ups in her file about an incident with the nurse, an incident with the psychologist and medication errors. Smith later received a letter from Girone stating that she was being terminated on the recommendation of Medley. The following reasons were given:

> It is our understanding that you have been warned repeatedly that your outburst and use of obscene language when interacting with peers, supervisory personnel and consultants is not acceptable and in need of immediate corrective action. Based on incidents reported on 4/21/91 and 4/22/91 when you verbally abused [Wright, Hampton and Quinones], it is apparent that you have not made efforts to improve and/or modify your behavior which adversely impacts on the well being of our clients and the smooth operation of the facility.
>
> Your actions in the dates in question constitute gross misconduct. Supervisory personnel is adamant about their inability to continue working with you and be the recipients of unprovoked insults and obscenities.

As noted above, Girone testified that employees were discharged for the reasons set forth in their letters of discharge. Therefore, it is clear that Respondent discharged Smith for alleged outbursts, obscene language and insults. Respondent produced a number of witnesses to support its position as to Smith's outbursts, language, and insults.

Hampton was called by Respondent. She testified that she wrote a note dated April 23, 1991, in Smith's file and that she signed it. Counsel for Respondent asked Hampton whether the facts in the note were true and she answered ''yes.'' This was Hamptons's entire testimony about the incident with Smith. She did not state when she had prepared the document. Doris Quinones was also asked by counsel for Respondent whether she wrote a note about Smith dated April 23, 1991, and whether the facts were true: she answered ''yes.'' Quinones did not testify when she had written the document. Quinones also identified two other notes in Smith's file as being in her handwriting. Awilda Wright identified a note in her handwriting dated April 23, 1991, in Smith's personnel file. She testified that she signed it and she answered in the affirmative when asked if the material was true and correct. Wright did not say when she had prepared the document. Wright stated that she had been an assistant residence manager for 1 week when Smith called the day after being beaten by a client. Wright, who was on a leave of absence when she testified, acknowledged that she had been given an unsatisfactory evaluation before she took her leave of absence; she was criticized for having difficulty supervising others and she was told that she must show improvement in interpersonal skills with the staff.

As described above, Smith testified in detail about the events of April 23 and the days following it. She denied cursing at management and, aside from an admitted loud outburst to Quinones, she denied yelling at the managers she spoke to after she was injured. Smith described fully her conversations with Hampton, Wright, Quinones, and Medley. In contrast, Respondent's witnesses merely identified documents in Smith's personnel file. They did not testify at all about their conversations with Smith. Further, even though Respondent apparently places its entire reliance on the material in Smith's file for Respondent's version of the events leading up to her discharge, Respondent presented no evidence about how these materials came to be prepared. There is no evidence that the writings were made close to the events they purport to describe. There is no evidence whether the documents in the files were prepared from notes taken when the conversations occurred. No witness testified whether the documents in the file were made of her own recollection or based on consultation with superiors or coworkers. In short, for aught that appears on the record, the documents in Smith's personnel file may have been prepared many months after Smith was discharged and may have been based on instructions from management in contemplation of the instant hearing.

I have decided that Smith's testimony about her injuries and the conversations following it should be credited as against the written documents in her personnel file which were not supported by direct testimony concerning the events at issue. Smith's account is plausible; she was beaten on the job and as she tried to get attention and information from Respondent's managers she formed the impression that no one was concerned about her injuries. After a few phone calls, Smith became agitated and yelled at Quinones. But Smith denied cursing, and I credit her. Her live testimony and my opportunity to observe her demeanor are a much stronger basis on which to base a finding of fact than mere documents whose authors do not testify about their recollections of the events.[8]

The letter discharging Smith refers to prior warnings given to Smith and her inability to correct obscene language, in-

[7] Smith denied that at any point she yelled or cursed at Wright.

[8] An examination of the various documents in Smith's files does not reveal that any instance of obscenity is cited. In these writings, Smith is accused of saying that not one of the ''goddamn people care what happens'' and that ''no one gave a damn about her or the rest of the staff and that she was tired of this shit.''

sults and outbursts to supervisors and peers. Medley testified that Smith's file does not contain any complaints about her interactions with peers. Smith described an incident with a male coworker who had a habit of harassing female employees; she complained to Medley about this and both Hampton and Medley acknowledged that they had heard other complaints about the man. Smith also described two incidents involving professional consultants to the facility. One day, while Nurse Doris Figueroa was conducting an in service training session, she accused Smith of laughing during the lecture. Smith explained that someone else had laughed. Figueroa testified that when she asked Smith why she was laughing, Smith denied that she had done it and asked if Figueroa were paranoid. Figueroa found this retort disrespectful and she reported it orally to Medley. Medley spoke to Smith about the incident. According to Smith, Medley did not give her a written warning about the incident. Smith's file does contain a ''conference form'' written by Medley after she spoke to Smith about this incident. Medley did not testify how long it was after the conference with Smith took place that she completed the form nor did Medley testify about her conversation with Smith concerning the incident with Figueroa. As I have stated above, a memorandum placed in an employee's file is no substitute for live testimony about an incident, especially when there are no details about how or when the memo was prepared and the memo contradicts the testimony of the employee about the conference. Smith also testified about an incident with Dr. Heriberto Cerpa, a clinical psychologist who was conducting an in service training course for direct care workers. According to Smith, she was completing certain records required by Respondent when Cerpa called the group to attention. When Smith continued writing in the book, Cerpa told her to pay attention but Smith replied that she was just finishing. Then Cerpa told Smith to close the book and she did so. Cerpa testified that after this incident took place, he told Medley that Smith would have to be managed due to her hostility and anger over an essentially neutral situation. Medley testified that she met with Smith about Cerpa's complaint and that Smith agreed to be accommodating in the future.

Respondent was well aware of Smith's union activities; Medley had asked Smith whether she was involved and Smith had replied that she supported the Union. As discussed above, I have found that Respondent had antiunion animus. I have further found that Respondent has committed violations of Section 8(a)(1) of the Act. I find that a motivating factor in Smith's discharge was the fact that she was active on behalf of and supported the Union. However, Respondent offers a defense and I must decide whether Respondent would have discharged Smith even if she had not engaged in any union activities. *Wright Line*, supra. I shall begin with an examination of Respondent's practices with respect to other employees who had been counselled or warned about their performance on the job.

Respondent's personnel records show that direct care employee Wilfredo Lopez had various difficulties relating to repeated lateness and absence. When he was confronted by supervisors, Lopez became hysterical and threatened the residence manager. On other occasions, Lopez threatened coworkers and superiors with physical violence to the extent that they were frightened and nervous and they contemplated filing a complaint with the police. Lopez was also cited for engaging in loud scenes at the residence. This behavior continued for several years beginning in 1989, but Lopez was not discharged for his behavior. On May 28, 1991, direct care worker Stephanie Vaughn was counselled by Wright about the manner of speech and insubordinate attitude she used to address managers and supervisors. Vaughn had threatened that she might not come to work. Medley acknowledged that Vaughn was not disciplined for her actions. Direct care worker Linda Jackson had a pattern of lateness and absence beginning in late 1989; on occasion she left early without permission and she slammed doors in the facility when she was told she could not leave work. According to the personnel file, Jackson had a problem controlling her feelings. Medley acknowledged that there was no written warning for this conduct in Jackson's file.

These examples show that Respondent tolerated door slamming, a rebellious attitude, insubordination, loud scenes and threats of violence to coworkers and superiors when engaged in by other direct care workers. However, with regard to Smith, Respondent discharged her after she was beaten by a client when she became upset that no one in management had called to see how she was faring and because no one seemed able to give her advice about how to take time off and apply for Workers Compensation. This is surely disparate treatment. The incidents with the nurse and the psychologist pale in comparison with the acts engaged in by other employees who were not discharged, such as threats of violence, door slamming and the like. Further, the letter discharging Smith refers to difficulties with peers, an allegation which Medley admitted was unfounded, and prior warnings about insults and obscenities which do not appear in the record. I find that Respondent treated Smith disparately because she joined and supported the Union. Respondent discharged her, knowing that she was a union activist, just 5 days before the election. I do not find that Respondent has carried its burden of showing that it would have discharged Smith even in the absence of union activity. Respondent thus violated Section 8(a)(3) and (1) of the Act when it discharged Smith.

E. *Discharge of Mervis Lewis*

Mervis Lewis was a direct care worker at ICF 1. In February 1991, she signed a card for the Union. Later she went to union meetings, she distributed union literature and she both wore and distributed union hats and buttons. Lewis testified that Assistant Residence Manager Wright saw her in a group of union supporters who were posing for a group picture outside the facility.

On May 1, 1991, the day of the election, Lewis was to complete her shift at 8 a.m., having begun at 11 p.m. the night before. Before 6 a.m. that day, a Board agent arrived at the facility to conduct the election. Then Renee Velasquez, a business representative for the Union, came in. When it was close to 6 a.m., Velasquez told Lewis that she was looking for Felix Rivera who was supposed to be the union observer at the election. Rivera was not there. Lewis, who was taking her break from 6 to 7 a.m., told Velasquez that she would act as the union observer. Lewis testified that after her break, from 7 to 8 a.m. her duty was to ''float'' and help the other staff, sit in the dining room with any residents who might be there or watch out for the bus that comes to take clients to their day programs. At 6 a.m., additional staff came

in for the day shift. On May 1, Lewis had been assigned to be ''one on one'' with client Morales, a person who may not be left alone. When employee Juana Isaac came in at 6 a.m., she took over the responsibility for Morales and Lewis was no longer ''one on one'' with Morales.[9]

Lewis testified that while she was acting as the union observer, Assistant Residence Manager Wright came in to work and said, ''good morning.'' Then Residence Manager Hampton and Medley also reported to work and they greeted Lewis as well. Lewis, having been told by the Board agent that she was not to speak to anyone while she was the union observer, did not ask Wright, Hampton nor Medley if she could continue observing after her break, that is for the last hour of her shift from 7 to 8 a.m. No one in management said anything to Lewis about her actions in having acted as the union observer and no one told her that she did not have permission to continue being an observer.

Residence Manager Hampton testified that on the day of the election, she arrived at the facility at 6:30 a.m. She saw Lewis acting as the union observer for the election. It is not contended by Respondent that Hampton instructed Lewis to cease observing.

Lewis testified that on May 6 she was cooking in the facility when she was summoned to Medley's office where she found both Medley and Quinones.[10] Medley asked Lewis what happened on May 1; she asked whether Lewis knew it was chaos in the facility and that Morales had hit another client. Medley asked Lewis who had given her permission to be the observer for the Union; Lewis replied that nobody had given her permission. Lewis also told Medley that when members of management reported to work, none of them told her that she could not remain as the observer. Medley then told Lewis that she did not like Lewis' attitude and she sent Lewis home, telling her that she was suspended. Lewis stated that nothing was mentioned at this meeting concerning conduct to peers and supervisors; the only subject was May 1, 1991.

Lewis eventually met with Assistant Executive Director Gonzalez on June 3 or 4. Gonzalez told Lewis that according to Medley she had abandoned her duties and that she would be fired. When Lewis asked for this to be put in writing, Gonzalez told her that the discharge letter had not yet been prepared.

Lewis received a letter from Gonzalez dated June 4, 1991, which stated, in relevant part:

> [S]upervisory personnel have consistently documented a pattern of lateness and instances of negative verbal exchanges on your part with consultants, supervisory personnel and peers.
>
> [T]he incident which took place May 1, 1991 when you abandoned your duties to supervise the election which is an act of gross misconduct, could not be overlooked. . . . As a result you placed your clients in jeopardy. Your actions of that date have led us to terminate your employment. . . .

Lewis' file contains one memorandum that she came to work 12 minutes late on one occasion.[11] Respondent does not point to any other documents which would establish a ''pattern of lateness.''

Lewis testified that there is a message book in the facility in which workers on different shifts write messages to each other as a means of communication. Lewis stated that an employee might write that there is not enough food or that a client needed supervision because her room was in disarray. On February 21, 1991, Medley wrote Lewis a note that she was placing abrasive messages in the book. Although Respondent contends that Lewis received a letter from Hampton about this prior to February 21, Lewis denies that assertion.

Lewis testified that client Morales is retarded: she hits others, spits, curses, kicks, bites, throws her helmet around, tears the tablecloth and knocks food over. On February 23, 1991, Cesar Garces, a social worker wrote a note to Hampton stating that he had observed Lewis show frustration and poor tolerance when working with Morales. As a result, Lewis' shift was changed so that she would have more supervision. On March 10, Garces again wrote to Hampton complaining that when he asked Lewis for some information about a client, she refused to answer and was disrespectful. Lewis testified that she did not refuse to give Garces the information. Garces did not testify herein. Nurse Figueroa testified that she once observed Lewis sitting in Morales' room while the latter was lying in bed crying. She asked Lewis why Morales was crying and Lewis responded, ''How am I supposed to know. Why don't you ask her.'' Morales then told Figueroa that she wanted to get out of bed and have some coffee. Figueroa testified that Morales should not have been in bed and crying and that Lewis' response to her was inappropriate. Figueroa reported this incident to Medley.

Respondent's files show that on January 18, 1991, a supervisor wrote that Lewis ''is performing a very good job; she is cooperative, conscientious and very knowledgeable.'' Lewis' personnel file contains other material but those items do not relate to any of the reasons cited in Gonzalez' letter of dismissal. Further, those matters seem to be either mistakes on the part of Respondent or problems caused by supervisory errors. Therefore, I do not deem them relevant to the issue of Lewis' discharge.

Medley testified that when she met with Lewis after May 1, she told Lewis that she had left her assigned duties and she asked Lewis who had given her authority to abandon her client. Medley told Lewis that Velasquez had telephoned her at home early that morning to ask whether Lewis could be excused and that she had refused permission.[12] According to Medley, she wanted to know who had authorized Lewis to leave the clients. Medley testified that she told Lewis that

[9] According to employee Lucy Diaz who worked this shift with Lewis, on the day of the election four direct care workers came in at 6 a.m.

[10] Respondent's employees regularly perform a number of jobs in the facility. When the residence is short staffed, direct care workers may act as cook.

[11] After her suspension, Lewis was given a 10:30 appointment with Medley. Lewis arrived at 10:15 and Medley was in another meeting so Lewis waited outside. Eventually, Medley came out and told Lewis she should have been there at 10 a.m. The meeting was rescheduled. I do not believe this incident is meant to be covered by Gonzalez' letter which I believe refers to problems Lewis had on the job.

[12] Velasquez maintained that she had asked permission for a different direct care worker to be an observer. It is of no moment which employee Velasquez had asked to be relieved since there is no suggestion in the record that Lewis was aware that Velasquez had asked Medley if Lewis could leave her post.

Lewis was not accused of doing anything wrong but that Medley just wanted to find out who authorized Lewis to observe the election. Medley stated that Lewis said she could not recall; she refused to answer the question and the discussion became heated.[13] Medley told Lewis to leave the building and that she would recommend a 3-day suspension ''because I felt it was insubordinate after three requests—that she calm down and try to help me get to the bottom of this matter. And she refused.'' Before Lewis left, according to Medley, Lewis punched the wall behind Medley, inches from her face, and then Lewis went upstairs and told everybody that she was being terminated for union activity. Lewis then returned and asked Medley if she was suspended or terminated, and Medley replied that Lewis was suspended. Medley testified that she referred the matter to headquarters and told her superiors that she did not feel comfortable working with Lewis after this incident.

Medley acknowledged that after she spoke to Velasquez on the day of the election she did not inform any of the supervisors at the facility that she had refused permission for an employee to be released to observe the election. Medley also stated that she did not know whether anyone had told Lewis that she should not be an observer. Medley conceded that when she interviewed Lewis she told her that she was not accusing her of wrongdoing; however, she then recommended to Girone that Lewis be terminated for abandoning her post. Medley stated that when Lewis was on her lunchbreak she was permitted to do anything she pleased. Medley testified that she did not know what period of time Lewis actually acted as an observer. She recalled that Lewis told her that someone else was watching Morales. Medley conceded that an employee with a ''one on one'' patient was entitled to take a 1-hour break; however, Medley also seemed to maintain that no one else could cover for such a patient because all the other employees have duties that require their attention. I formed the impression from listening to Medley testify that she was laboring mightily to prove that Lewis was not entitled to a break from 6 to 7 a.m. even though she was not able to testify categorically that that was the case. I find that Medley's testimony on this issue was shifting, evasive and unreliable. I also find that Medley's testimony about how she came to recommend discharge is inconsistent and unreliable. It is clear that Medley told Lewis she was not charged with wrongdoing but that Medley only wanted to find out who authorized Lewis to act as observer. When Lewis could not enlighten Medley, she told Lewis she would recommend a 3-day suspension for insubordination in refusing to answer the question. After Lewis purportedly hit the wall and complained to others in the facility, Medley decided she did not feel comfortable working with Lewis; but instead of recommending termination on that basis, Medley recommended to Girone that Lewis be terminated for leaving her post. The termination letter issued to Lewis does not mention the interview with Medley and it states that by leaving her post Lewis engaged in gross insubordination and was therefore being discharged. Thus, ''headquarters'' evidently did not believe that the final interview with Medley was grounds for discharge. Lewis was recalled on General Counsel's rebuttal and she denied hitting the wall behind Medley. In view of Lewis' denial that she hit the wall and the fact that this incident is not cited as a reason for discharge, I doubt that the incident occurred and I find that it is irrelevant to the discharge.

Gonzalez testified that on the morning of the election, she spoke to the Board agent conducting the election at the facility and she told him that no employee could be released to act as an observer until there was coverage. Gonzalez said that a staff person could be released as soon as another staff member was available to cover the observer's duties. Gonzalez confirmed that she told Lewis at the discharge interview that she was discharged for leaving her client to her own devices. Gonzalez testified that she did not know if Lewis was beginning or ending her shift at the time of the election and she did not know when Lewis was scheduled to take a break.

The record establishes that Respondent was aware when it discharged Lewis that she was a union supporter. This fact, coupled with Respondent's antiunion animus and the fact that Respondent engaged in conduct that violated Section 8(a)(1) leads me to conclude that Lewis' activities on behalf of the Union were a motivating factor in her discharge. *Wright Line*, supra. Respondent's letter of discharge cites her prior conduct and the fact that she abandoned her client. I find that these reasons are pretexts. Lewis' personnel file does not show any pattern of lateness nor does it show more than minor difficulties with respect to the message book and two exchanges with professional consultants. Further, Respondent's letter of discharge clearly relies on Lewis' conduct on the day of the election as the reason for the discharge; the other matters are cited as background and none of Respondent's witnesses testified that Lewis would have been discharged had she not acted as the election observer on May 1. The cited reason of abandoning her post also seems pretextual. First, none of the managers who saw Lewis observing the election said anything to her or to the Board agent about Lewis returning to her duties. This is in accord with Gonzalez' statement to the Board agent that an employee could be released to observe the election as soon as coverage was obtained. In fact, when Isaac took over Lewis' duty to be ''one on one'' with client Morales, that condition had been fulfilled. Lewis was on her break from 6 to 7 a.m.; had there not been ample coverage from 7 to 8 a.m. one of the managers would have instructed her or the Board agent that Lewis was required on the job. Second, when Medley interviewed Lewis and asked who had authorized Lewis to act as an observer, Medley specifically told Lewis that she was not charged with any wrongdoing but that Medley merely wanted to know who told her to be the union observer.

Moreover, even if Respondent were not found to be citing Lewis' actions as a pretext, I would find that Respondent would not have discharged Lewis for acting as the observer on May 1 from 7 to 8 a.m. Indeed, I would find that the discharge constituted disparate treatment. Respondent's personnel files show, and Medley acknowledged, that a number of other employees engaged in activities similar to those alleged against Lewis and that they were not discharged. Employee Linda Jackson left work early without permission and also slammed the door and used obscene language when she was told she could not go home early. Jackson was not given a written warning and she was not discharged. Her action in leaving work early was surely the same as that attributed to

[13] Medley did not provide any details about the ''heated'' nature of the discussion.

Lewis, namely, taking 1 hour off at the end of her shift. On May 29, 1991, employee Delia Lopez was cited for failing to follow up concerning a client who had scratches on his body, for requesting time off without adequate notice and for ''hanging out'' on the front steps of the facility and leaving the facility to go next door while on duty. Lopez was informed that her actions threatened client safety and that as a result she would be monitored more closely. In June, Lopez received a 3-day suspension for her attitude and for slamming the door on receiving instructions from management. Lopez was not discharged for this activity which is surely more egregious than that attributed to Lewis by Respondent. I am convinced that Respondent would not have discharged Lewis but for her union activity and I thus find that Respondent violated Section 8(a)(3) and (1) when it discharged Lewis.

F. *Evaluation of Lucy Diaz*

Lucy Diaz has been employed as a direct care worker by Respondent for 13 years. She signed an authorization card for the Union on January 18, 1991, and began wearing a union button to work. Diaz attended the preelection conference held at the Regional Office. On the day of the election, Diaz acted as an observer for the Union at either ICF 2 or ICF 3.

In January 1992, Diaz received an unsatisfactory annual evaluation for the past year and she was placed on probation for 3 months. Respondent concedes that in all prior years, Diaz had received satisfactory or higher evaluations. Diaz was the only direct care worker at ICF 1 to receive an unsatisfactory evaluation in January 1992. The record shows that Diaz was denied a raise as a result of the unsatisfactory evaluation. However, issues relating to the size and timing of the raise she might have otherwise received were not litigated herein and they are thus appropriately deferred to a compliance proceeding.

Diaz' evaluation was performed by Medley and by Carmen Lopez who had become the Residence Manager in June 1991. Medley testified that she was aware that Diaz was active in the Union when she evaluated Diaz, but Medley denied that she was influenced by Diaz' activities.

The evaluation criticizes Diaz for failing to notify supervisors of lateness; however, the evaluation form shows that Diaz had not been late since her last annual appraisal. I conclude that this criticism is gratuitous and unfounded.

The evaluation form used by Respondent is a preprinted document consisting of several sheets of paper. There are various titles or categories under which an employee is rated on an ascending scale from 1 to 4 points. Next to each number from 1 to 4 a brief summary of the value is given, such as ''sloppy,'' ''does only minimum,'' ''exceeds requirements of the job'' and the like. The evaluator indicates the points awarded in each category by placing an asterisk next to the number from 1 to 4. Space is provided in each category or title for the evaluator to provide additional comments after the rating from 1 to 4 points has been performed. On the last page of the evaluation form, a line reads as follows:

> OVERALL EVALUATION: UNSATISFACTORY SATISFACTORY VERY GOOD OUTSTANDING

When an evaluation has been performed, the total of all the points received is shown to the right of this line as ''19 points'' or ''21 points.'' In addition, the overall evaluation indicated by the total points achieved is shown by bracketing one of the descriptions on the line. The testimony in this case shows that a total of 21 points would lead to the word ''SATISFACTORY'' being bracketed; a total of only 19 points would lead the evaluator to bracket the word ''UNSATISFACTORY.''

On Diaz' evaluation form, the title ''Quality of Work'' shows that Diaz was given two points and rated acceptable. The comment for this title states that Diaz requires constant reminders to complete client goal documents and incident reports. Diaz denied that she did not complete the documents on time and she testified that she had never been warned that she was deficient in this area. Medley testified that employees who do not complete documents are given written warnings, and she identified several such in evidence. Medley conceded that Diaz had never been written up for failure to complete documentation. I find that this criticism is unfounded.

Diaz received two points for meeting the minimum standard under the title ''Quantity of Work.'' Diaz testified, and her file shows, that Diaz was never warned that she only did the minimum amount of work required.

Diaz received two points for satisfactory ''Job Knowledge.'' The comment states that Diaz fails to implement her knowledge most of the time and it cites a failure to follow the Behavior Modification Plan (BMP), for individual clients as well as a sandwich Diaz once made for a client. Diaz denied that she failed to carry out the BMP for clients and her record does not show that she was ever warned for this. As to the sandwich, Diaz explained that the facility often runs short of food and the clients are often fed successive peanut butter and jelly sandwiches. Those clients who function at a higher lever get tired of peanut butter and jelly. One such client, Torres, complained to Diaz on one occasion and since there was some bologna on hand, Torres stated that he would prefer that. Diaz then prepared him a sandwich of bologna, mayonnaise and jelly. Diaz was criticized for this in her evaluation although at the time no warning was issued to her orally nor in writing. Respondent presented no evidence before me to show that this sandwich was improper from a health or dietary standpoint. It is not self evident that this sandwich could cause harm to Respondent's patients. Indeed, bologna and mayonnaise are often served together and many meats are served with a fruit jelly on the side. I find that Respondent seized on this incident to criticize Diaz without apparent justification.

Diaz received two points for ''Planning and Organizing,'' with the comment that she failed to give adequate notice for her medical appointments and that she refused to attend in service training and staff meetings. Diaz has a heart condition, chronic asthma, vascular disease and two hernias. She acknowledged that on one occasion she called and told Hampton that her legs were swollen and she could not come to work. Diaz testified that she did not refuse to attend meetings, but occasionally she has missed them because she had medical appointments.

Under the title ''Judgment,'' Diaz was given two points for having dependable judgment only on routine matters and requiring direction. The comment cites the infamous bologna

sandwich, allowing a client to rip his clothes and hiding knives. Diaz testified that she never allowed a client to rip his clothes and that she had never been warned about such an incident. Diaz stated that state law requires knives to be out of reach of clients and she has followed this procedure. Diaz has never been warned about a failing in regard to knives.

Under the title ''Initiative,'' Diaz was given two points for being able satisfactorily to perform routine assignments. The comment criticizes Diaz for refusing all proposed changes in schedule, duties and managers. The comment states that Diaz fails and constantly needs consulting to keep clients from engaging in disruptive behavior. Diaz testified that she prefers to keep to her existing evening shift from 11 p.m. to 8 a.m. because of her medical condition but that she has performed other shifts at management's request. Diaz denied that she found it necessary to consult managers about routine matters and she denied that she had ever been warned about this or that she had been told that she was uncooperative. Diaz pointed out that there are no managers on her shift at night.

The evaluation form gives Diaz two points for ''Reliability,'' stating again that she does only what is necessary and nothing more. The comment further criticizes Diaz for hesitating to stay for coverage when necessary.

Under the title ''Adaptability,'' the typed asterisk was placed next to a value of two points. However, the asterisk was crossed out by hand and a new one pencilled in next to only 1 point given for being inflexible; that is, not functioning in new environments and having difficulty grasping new skills. The typed comment at the bottom criticizes Diaz for being unwilling to change her schedule. Under the title ''Cooperation and Attitude,'' Diaz had been awarded two points. Here again the typed asterisk had been crossed out by hand and an asterisk was pencilled in next to the lowest point, demonstrating a lack of cooperation and team work and a failure to get along with others. The comment criticizes Diaz for failing to be helpful or cooperative with supervisors, for being defensive and argumentative. The comment closes with the criticism that Diaz has complained to the executive director of Respondent on several issues. Diaz testified that she has never been warned for being uncooperative with managers.

Under the title ''Resident Care,'' Diaz was given 1 point for failing to care for the residents satisfactorily and for requiring constant supervision. The comment mentions for the third time the bologna sandwich. It also mentions that a client went unshaven, not properly dressed and wearing someone else's clothes to a day program. Diaz testified that she had never permitted clients to go out unshaven or improperly attired and that she had never been warned about such behavior. This is another baseless criticism.

Finally, for ''Programming,'' Diaz was given two points for following instructions while not understanding concepts and requiring close supervision. Here again, the comment criticizes Diaz for failing to complete documents, but as shown above, Diaz was never warned about this matter. The comment criticizes Diaz for doing too much to assist her clients; this is in contrast to comments in other parts of the evaluation which criticize her for doing too little. Respondent did not offer any testimony to explain this seeming contradiction. Once again, I find that the criticism of Diaz seems baseless.

Under ''Overall Evaluation,'' the word SATISFACTORY had been marked originally by typed brackets, and Diaz had been awarded a total of 21 points. However, the satisfactory designation was crossed out by hand and the word UNSATISFACTORY bracketed. Further, the typed award of ''21 points'' was crossed out and ''19 points'' was written in by hand.

Girone testified that she has known Diaz for 10 years; she meets with Diaz when she visits the facility. Girone testified that Diaz was always cooperative and that she was always willing to do her best. Before the evaluation, Girone had never been told that Diaz was unable to work with people. All of Diaz' prior evaluations show that she had an excellent relationship with her peers and was rated satisfactory for cooperation with management.

Lopez testified that she used to correct Diaz verbally and that she never issued a written warning to Diaz for being uncooperative and for doing only the minimum necessary. However, Lopez stated that Diaz was uncooperative, that it was hard to make her understand and that she was hesitant to receive directions. Lopez did not give any specific examples of Diaz' purported failings in these areas. Lopez' hours are from 8 a.m. to 5 p.m. When it was pointed out to her that she could hardly have had much contact with Diaz who worked from 11 p.m. to 8 a.m., Lopez changed her answer to say that in the summer of 1991 she worked from 6 or 7 a.m. to 3 p.m. Unless Lopez would have me believe that she worked 24 hours in a day, I cannot find that she had much occasion to observe Diaz.

It is instructive to contrast the evaluation given to Diaz, a long service employee of Respondent who had a history of satisfactory and excellent ratings, with that given to employee J. Alvarado by Medley and Lopez. Alvarado performs the same job as does Diaz at ICF 1, but he has only worked for Respondent since 1990. Alvarado was rated ''Satisfactory'' at a point total of 21, and he was given a raise in January 1992. Medley and Lopez wrote in Alvarado's evaluation that he refuses to stay to provide needed coverage, that he refuses to assume responsibility for client and agency property, that he seldom does more than the minimum work required, that he does not apply client behavior modification plans, that he did not intervene when a client went out in his underclothes, that he does not take time to plan and organize, that he refuses to apply his intelligence and defers all decisions to peers and supervisors, that he is passive, that he is unreliable in quality of work, that he will not change his shift times because he is a fulltime college student, that he has a defensive and negative attitude toward managers, that he fails to collect data and that he fails to follow methods. These criticisms are remarkably similar to those leveled at Diaz. The conclusion seems inescapable that Respondent evaluated Diaz disparately.

Lopez testified that she and Medley evaluated Diaz and that Medley then had the evaluation typed at headquarters. From Lopez' testimony it is evident that the method used was to give a handwritten evaluation form to the typist and that Lopez and Medley then reviewed the typewritten form before it was given to Diaz. When confronted with the fact that the typed form originally gave Diaz a satisfactory rating with a total of 21 points and that two titles originally valued at 2 points had been changed to 1, Lopez stated that this was a typing error. She testified that the two titles where the as-

terisk was changed to show a lower rating had originally been marked ''1'' but that the typist erred and placed the asterisk next to ''2.'' Diaz further testified that originally she had written ''19 points'' but that the typist made an error and typed ''21 points.'' Finally, Diaz stated that she had originally bracketed the rating ''UNSATISFACTORY'' but that the typist made an error and bracketed ''SATISFACTORY.'' Medley similarly testified that she and Lopez had originally given Diaz ''19 points'' and had marked her unsatisfactory but that the typist at headquarters had made typographical errors and changed the rating. This explanation strains credulity. First, my observation of both Medley and Lopez while they were testifying to this scenario convinced me that they were evasive and that they had a script and they were determined to stick to it. Further, their explanation makes no sense. I am willing to believe that a typist might, in error, twice type asterisks next to a ''1'' rather than next to a ''2.'' But I cannot conceive how a typographical error can change ''19 points'' into ''21 points''; the two numbers are not similar in appearance and the placement of the individual keys on the keyboard would not lead to this kind of typographical error. Further, it is most unlikely that a typist would, on the same line in a document, erroneously type brackets around the word ''SATISFACTORY'' instead of ''UNSATISFACTORY,'' thereby producing a rating of 21 points consistent with a satisfactory rating. If the typist were careless, it would be just as likely that he or she would bracket ''VERY GOOD'' or ''OUTSTANDING'' rather than fortuitously picking just the word that matched the 21 point rating. In sum, I find that Medley and Lopez were untruthful. I find that they had originally given Diaz 21 points and a satisfactory rating, but that they later changed the evaluation so that Diaz could be marked unsatisfactory, placed on probation and denied a raise. I note that many of the criticisms leveled at Diaz concerned matters which were not supported by testimony nor by written warnings to the file. I also note Medley's testimony that Respondent has a policy of documenting problems and that no employee should be taken by surprise upon receiving an unsatisfactory rating.

I have found above that Respondent has an antiunion animus. Respondent Was aware of Diaz' activities in support of the Union. I find that Medley and Lopez devised negative comments in Diaz' evaluation because she supported the Union; Medley and Lopez used unfounded criticisms and disparate point awards to evaluate Diaz. In addition, after completing the evaluation, Medley and Lopez then downgraded Diaz still further, making last minute changes in her total points and overall evaluation so that she would be deemed unsatisfactory, placed on probation and denied a raise. Medley and Lopez used pretexts to downgrade Diaz because Diaz supported the Union. Respondent thus violated Section 8(a)(3) and (1).

CONCLUSIONS OF LAW

1. By interrogating its employees about their activities in support of the Union, by instructing its employees to report union activity, and by instructing its employees not to engage in union activities at its facility, Respondent violated Section 8(a)(1) of the Act.

2. By discharging its employees Avery Smith, Lillian Lafont, and Mervis Lewis because they supported the Union, Respondent violated Section 8(a)(3) and (1) of the Act.

3. By giving an unsatisfactory evaluation to its employee Lucy Diaz, placing Diaz on probation and denying her a raise because she supported the Union, Respondent violated Section 8(a)(3) and (1) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged employees, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The Respondent having discriminatorily evaluated Lucy Diaz, it must be ordered to expunge the unsatisfactory evaluation from its files and to make her whole for the denial of the raise she would have received but for the unlawful evaluation in the manner described above.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[14]

ORDER

The Respondent, Puerto Rican Family Institute, Inc., New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating its employees about their union activities, instructing its employees to report union activities, and to refrain from engaging in union activities on its premises.

(b) Discharging any employee or unsatisfactorily evaluating any employee for supporting the Union.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Avery Smith, Lillian Lafont, and Mervis Lewis immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section.

(b) Remove from its files any reference to the unlawful discharges and notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(c) Remove from its files any reference to the unsatisfactory evaluation of Lucy Diaz and notify her that this has

[14] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

been done and that the unlawful evaluation will not be used against her in any way, and make whole Lucy Diaz for the loss of the raise and any other benefits she would have received but for her unlawful evaluation in the manner set forth in the remedy section.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its three ICF locations in the Bronx, New York, copies of the attached notice marked ''Appendix.''[15] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[15] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge you, give you unsatisfactory evaluations, or otherwise discriminate against any of you for supporting Local 144, Hotel, Hospital, Nursing Home & Allied Services, SEIU, AFL–CIO, or any other union.

WE WILL NOT coercively question you about your union support or activities and WE WILL NOT instruct you to refrain from union activities on our premises.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Avery Smith, Lillian Lafont, and Mervis Lewis immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL notify each of them that we have removed from our files any York reference to her discharge and that the discharge will not be used against her in any way.

WE WILL remove from our files any reference to the unsatisfactory evaluation of Lucy Diaz and notify her that this has been done and that the unlawful evaluation will not be used against her in any way, and WE WILL make Lucy Diaz whole for the loss of her raise and any other benefits she would have received but for her unlawful evaluation.

PUERTO RICAN FAMILY INSTITUTE, INC.